LIBRARY
SUPREME COURT, U. S.

No. 71-616

Supreme Court, U.S.
FILED
1971
E. ROBERT SEAVER, CLERK

In The Supreme Court of The United States

FALL TERM, 1971

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 and STERLING DENNIS,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., and THE DALEY CORPORATION,

Real Parties in Interest.

---

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 and ERNEST HEINRICH,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC. and CAMERON BROTHERS CONSTRUCTION CO. INC.,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

BRUNDAGE, WILLIAMS & ZELLMANN
By: JERRY J. WILLIAMS
3746 Fifth Avenue
San Diego, California 92103
Telephone (714) 297-1131

Attorneys for Petitioners

SUBJECT INDEX

JURISDICTION 2

QUESTIONS PRESENTED 3

STATUTES INVOLVED 4

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT:

I THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS BEEN VIOLATED BY THE COURTS' CONCLUSION THAT A "NO-STRIKE" PROVISION IN A COLLECTIVE BARGAINING AGREEMENT INCLUDES ACTIVITY PROTECTED BY THE COMMON-SITUS PICKETING DOCTRINE, EXPRESSED IN SAILOR'S UNION OF THE PACIFIC, 92 N.L.R.B. 547 (1950), AND APPROVED BY THE COURT IN LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO V. N.L.R.B., 336 U.S. 667 (1961 9

II RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN GRANTING INJUNCTIVE RELIEF IN THAT WHEN AN ACTIVITY IS ARGUABLY REGULATED BY SECTION 8 OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT (29 U.S.C. SECTION 158) STATE COURTS MUST DEFER TO THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD 10

SUBJECT INDEX (Continued)

Page

III RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT A STATE COURT IS WITHOUT POWER TO HOLD ONE IN CONTEMPT FOR VIOLATING AN INJUNCTION THAT THE STATE COURT HAD NO POWER TO ENTER BY REASON OF FEDERAL PREEMPTION 11

IV RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION SINCE THE REAL PARTIES IN INTEREST FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES 12

V RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN FINDING DEFENDANTS GUILTY OF CONTEMPT IN THAT NO DECLARATIONS OR AFFIDAVITS OR ANY OTHER COMPETENT EVIDENCE WAS OFFERED OR RECEIVED IN EVIDENCE 15

VI RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT THE FINDINGS OF CONTEMPT WERE MADE BASED UPON CONDUCT THAT WAS NOT CLEARLY A VIOLATION OF THE ORDER 15

VII RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT THERE WAS NO BASIS FOR FINDING THE UNION LIABLE FOR THE CONDUCT OF EMPLOYEES OF THE REAL PARTIES IN INTEREST 19

SUBJECT INDEX (Continued)

Page

CONCLUSION 22

APPENDIX 23

TABLE OF AUTHORITIES CITED

Page

CASES

Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383 11

Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) 10-12

Elevator Mfr's Assn. v. Elevator Constructors [U.S.D.C., S.D.N.Y. 78 LRRM 2215 (1971)] 12

Foust v. Foust, 47 Cal. 2d 121 (1956) 18

Green, In re, 369 U.S. 689 (1962) 11

Hollon v. Pierce, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 12

Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO v. N.L.R.B., 366 U.S. 667 (1961) 3,9,18

Local 861, International Brotherhood of Electrical Workers and Plauche Electric, Inc., 135 N.L.R.B. 250 (1962) 18

McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. 2d 45 (1957) 11

Morton v. Superior Court of Fresno County, 9 Cal. App. 3d 982, 88 Cal. Rptr. 533 12

TABLE OF AUTHORITIES CITED (Continued

Page

CASES (Continued)

Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512 (1951) 19, 20

Plummer v. Superior Court, 20 Cal. 2d 158 (1942) 18

Sailor's Union of the Pacific (Moore Dry Dock Case) 92 N. L. R. B. 547 (1950) 3, 9, 16, 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9, 10

Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960) 15

United Farm Workers Organizing Committee v. Superior Court (1971), Cal. Supreme Court, S. F. 22791, April 15, 1971 15

United States v. United Mine Workers, 77 F. Supp. 563 (D. D. C. 1948) 10

Williams v. Pacific Electric Ry. Co., 147 Cal. App. 2d 1 (1956) 14

TABLE OF AUTHORITIES CITED (Continued)

Page

STATUTES

California Code of Civil Procedure,
Section 457 14
Section 1280 et seq., Title IX 14
Section 1281.4 14

28 U.S.C., Section 1257(3) 2

MISCELLANEOUS

Labor Management Relations Act, Section 8 . . 8

Master Labor Agreement, Article III,
Paragraph A 6

Master Labor Agreement, Article XII,
Section E 6, 13

National Labor Management Relations Act
29 U.S.C., Section 158 10
Section *9b) (4) (A) or 8(b) (e) (B) 10

Taft-Hartly Act,
Section 8(b) (4) 21
Section 10(1) 21

United States Constitution,
First Amendment. 15
Fourtheenth Amendment 15

TABLE OF AUTHORITIES CITED (Continued)

Page

United States Constitution,
Fourteenth Amendment (Due Process
Clause and Article 6, Clause 2 (Federal
Supremacy Clause) 3,4,9

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1971

No. _____

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 and STERLING DENNIS,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., and THE DALEY CORPORATION,

Real Parties in Interest.

---

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 and ERNEST HEINRICH,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO,

Respondent,

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., and CAMERON BROTHERS CONSTRUCTION CO. INC.,

Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Petitioners pray that writs of certiorari issue to review the Judgments of the Superior Court of the State of California for the County of San Diego. Said Judgments found petitioners in contempt of court for alleged violations of temporary restraining orders prohibiting petitioners from engaging in strike activities against the real parties in interest.

JURISDICTION

The decisions of the California Fourth District Court of Appeal, entered on July 27, 1971, denied petitioners' Petitions for Writs of Certiorari without opinion. Petitions for hearings to the Supreme Court of California were denied, without opinion, on August 4, 1971 (5 Cal. 3d Minutes at 2).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Are contempt convictions, based upon declarations and affidavits filed in support of an Order to Show Cause, which were not offered or received in evidence a violation of the due process rights of petitioners?

2. Was the Supremacy Clause of the United States Constitution violated by the court's conclusion that a "no-strike" provision in a collective bargaining agreement prohibits activity protected by the common-situs picketing doctrine, expressed in Sailor's Union of the Pacific, 92 N.L.R.B. 547 (1950), and approved by this Court in Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B., 366 U.S. 667 (1961)?

3. Does a State court have jurisdiction to issue a temporary restraining order where jurisdiction of the State court is pre-empted by federal law and by the exclusive jurisdiction of the National Labor Relations Board?

4. Does a State court have power to hold one in contempt for violating an injunction that the State court had no power to enter by reason of federal pre-emption?

5. Does a State court act in excess of its jurisdiction when it issues a temporary restraining order where it is shown that the real parties in interest have failed to exhaust their administrative remedies?

6. Does a State court act in excess of its jurisdiction in making findings of contempt where there is a failure of proof that the conduct was clearly a violation of a temporary restraining order?

7. Does a State court act in excess of its jurisdiction when it makes a finding of contempt where there is no basis for finding the defendants liable for the conduct of employees of the real parties in interest?

STATUTES INVOLVED

The statutory provisions principally involved are the pertinent provisions of the 14th Amendment (Due Process Clause) and Article 6, Clause 2 (Federal Supremacy Clause) of the United States Constitution.

The questions presented in this Petition were raised for the first time in the Superior Court by submission by Points and Authorities in opposition to Plaintiffs' Order to Show Cause in re: Contempt. In the Petition for Writ of Certiorari these questions were again urged upon the Court of Appeal and the California Supreme Court.

STATEMENT OF THE CASE

Petitioners, the International Union of Operating Engineers, Local No 12, a labor organization (hereinafter "Union") represents the employees of Southern California Testing Laboratory, Inc. (hereinafter "Soil Testers").

Respondents in the actions below, Associated General Contractors of America, San Diego Chapter, Inc. (hereinafter "A.G.C."), Cameron Brothers Construction Company, Inc. (hereinafter "Cameron"), and the Daley Corporation (hereinafter "Daley") are named as the Real Parties in Interest in this Petition, and are employers

in an industry affecting commerce.

Workers who were represented for purposes of collective bargaining by the Union, engaged in a strike against Soil Testers. Since on or about January 21, and January 27, 1971, the Union and Ernest Heinreich and Sterling Dennis, members of the Union, picketed the common-situs job sites involved in this case. The picket signs carried, stated:

> "Southern California Testing Lab Unfair
> No Contract
> Operating Engineers Local 12
> Sanctioned by the San Diego Building Trades"

(C.R. Petition to Compel Arbitration and Complaint for Injunction Pending Arbitration, Exhibit B, February 1, 1971).[1]

The real parties in interest, who were also located on the common-situs job sites, have conceded that no labor dispute had or has existed between themselves and petitioners, but alleged in substance that a secondary boycott existed and that their employees had been induced to refuse to perform services solely by reason of the picket line established by petitioners at common-situs job sites. (C.R. Petition for Writ of Certiorari, May 7, 1971).

---

1 "C.R." refers to the Certified Record certified by the Clerk of the San Diego County Superior Court. The document referred to thereafter appears as a certified exhibit to the Certified Record.

The real parties in interest alleged that petitioners had breached Article III, Paragraph A, of the Master Labor Agreement between A. G. C. and the Union which provides in pertinent part:

> "During the term of this agreement, the Union shall not call or engage in, sanction or assist in a strike against or any slow down or stoppage of the work of the contractor."

(C. R. Petition to Compel Arbitration and Complaint for Injunction Pending Arbitration, February 1, 1971).

Article XII, Section E, of the aforementioned Master Labor Agreement sets forth a procedure for settling disputes by arbitration and specifically provides:

> "Neither party to this agreement shall file any action because of a claimed breach of this Agreement without giving notice, in writing, to the other party and allowing ten (10) days thereafter to such party for redress or correction, without first exhausting the grievance and arbitration procedure of this agreement."

It was conceded that this procedure was not followed by the real parties in interest (C. T.) [2]

---

[2] "C. T." refers to the Clerk's Transcript which appears as part of the Certified Record certified by the Clerk of the San Diego County Superior Court.

On January 28, 1971, the Superior Court of the State of California issued temporary restraining orders against Union and its officers and agents from causing, instigating, furthering, carrying on or otherwise aiding a strike of Daley or Cameron pending a resolution of the parties grievances. (C.R. Order to Show Cause and Temporary Restraining Order, February 8, 1971).

On March 1, 1971, petitioners were found guilty of Contempt of Court for violating the temporary restraining orders issued by the Superior Court, after the real parties in interest filed an Order to Show Cause in re: Contempt, and Declarations alleging various acts of contempt (C. T. 71).

At the hearings held on the Order to Show Cause no declarations, affidavits or testimony were offered or received in evidence (C. T. 20).

No proof was offered as to the identity of the employees who refused to cross or work behind the picket lines beyond the fact that they were employees of the real parties in interest, nor was any proof offered of Union involvement with, or control of said employees at the time the alleged violations occurred. (C.R. Petition for Writ of Certiorari, May 7, 1971).

Nowhere did the court find that any of petitioners used code or signals to induce the employees of Daley or Cameron to stop work, but rather the court appears to have relied on the picket line itself as being the so-called signal or inducement.

The court also indicated that picketing Soil Testers was not intended to have been prohibited by the restraining order (C. T. 71).

It was conceded by the real parties in interest that they had filed unfair labor practice charges with the National Labor Relations Board, charging that the Union's conduct, which was alleged to have violated the temporary restraining orders, also violated Section 8 of the Labor Management Relations Act, and that the National Labor Relations Board had, in fact, accepted jurisdiction over the subject dispute (C. T. 13).

The record is bare of any violent or threatening activity on the part of any of the parties, employees or employers herein. (C.R. Petition for Writ of Certiorari, May 7, 1971).

Upon the refusal of the Superior Court to dismiss the actions for lack of jurisdiction, and for acting in excess of its jurisdiction, petitions for Writ of Certiorari were filed in the Court of Appeal, Fourth Appellate District, State of California, but were denied without opinion. A hearing was denied without opinion by the California Supreme Court on August 4, 1971, and this Petition followed (5 Cal. 3d Minutes at 2).

REASONS FOR GRANTING THE WRIT

I

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION HAS BEEN VIOLATED BY THE COURTS' CONCLUSION THAT A "NO-STRIKE" PROVISION IN A COLLECTIVE BARGAINING AGREEMENT INCLUDES ACTIVITY PROTECTED BY THE COMMON-SITUS PICKETING DOCTRINE, EXPRESSED IN SAILOR'S UNION OF THE PACIFIC, 92 N.L.R.B. 547 (1950), AND APPROVED BY THE COURT IN LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS AFL-CIO V. N.L.R.B., 336 U.S. 667 (1961).

The United States Supreme Court held, in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), that to allow states to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

In concluding that a no-strike provision in a collective bargaininging agreement prohibits activity protected by the common-situs doctrine, the court has exerted control over activity exclusively controlled by federal law. Sailor's Union of the Pacific, 92 N.L.R.B. 547 (1950) commonly referred to as the Moore Dry Dock case.

In the case at bar, the strike conducted by petitioners was against Soil Testers located on the common-situs jobsite of the real parties in interest. Such activity is protected activity within the Moore Dry Dock case. It would be detrimental to the national labor policy and violative of the Supremacy Clause of the United States Constitution to find that activity protected by federal law

may on the other hand be used by a State court as a basis for finding a breach of a no-strike provision in a collective bargaining agreement. The effect of such a holding would destroy the vitality of the federal pre-emption doctrine in the field of labor law expressed in Garmon, supra.

II

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN GRANTING INJUNCTIVE RELIEF IN THAT WHEN AN ACTIVITY IS ARGUABLY REGULATED BY SECTION 8 OF THE NATIONAL LABOR MANAGEMENT RELATIONS ACT (29 U.S.C. SECTION 158) STATE COURTS MUST DEFER TO THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

Respondent cited Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970), for the proposition that State courts have jurisdiction to grant injunctive relief against a union which breaches a "no-strike" clause of a collective bargaining agreement. However, Boys Markets did not involve any possible N.L.R.B. jurisdiction, and in that case the defendant union refused to arbitrate. The union admittedly and avowedly was on strike against the plaintiff-employer. In the case at bar, arbitration has been had, and the N.L.R.B. had accepted jurisdiction over the alleged labor dispute. Furthermore, the Union has never refused arbitration and in fact has requested it. The Union is not and never has been on strike against any of the real parties in interest.

In the cases at bar, the complaints and declarations filed clearly posed the issue of whether or not the conduct complained of was within the proscription of Section 8(b)

(4) (A) or 8(b) (4) (B) of the Labor-Management Relations Act. It clearly was more than a suggestion that a secondary boycott existed and that employees of other employers may have been induced to refuse to perform services or cease doing business. In fact, that is precisely the issue posed by the complaints. This situation is clearly distinguished in McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. 2d 45 (1957), as giving exclusive jurisdiction to the National Labor Relations Board.

III

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT A STATE COURT IS WITHOUT POWER TO HOLD ONE IN CONTEMPT FOR VIOLATING AN INJUNCTION THAT THE STATE COURT HAD NO POWER TO ENTER BY REASON OF FEDERAL PRE-EMPTION.

In Amalgamated Association v. Wisconsin Employment Relations Board, 340 U.S. 383, the court specifically held that federal pre-emption in the field of labor law barred contempt proceedings on an injunction granted without subject matter jurisdiction.

In re, Green, 369 U.S. 689 (1962), an employer who was engaged in a labor dispute with a union, which dispute was the subject of an unfair labor practice charge pending before the National Labor Relations Board, sued in a State Court to enjoin peaceful picketing by the union, and the State Court issued a restraining order without a hearing. Petitioner, who was counsel for the union, was held in contempt for disobeying or resisting its restraining order. It was held that the State Court was acting in a field reserved for the National Labor Relations

Board and his conviction was set aside.

IV

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION SINCE THE REAL PARTIES IN INTEREST FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES.

> " It is settled that the exhaustion of an administrative remedy, where one is available, is a condition precedent to obtaining judicial relief, and that 'a court violating the rule acts in excess of jurisdiction.' " Morton v. Superior Court of Fresno County, 9 Cal.App.3d 982, 88 Cal.Rptr. 533, 535. citing Hollon v. Pierce, 257 Cal.App.2d 468, 475, 64 Cal.Rptr. 808, 812.

In at least one federal court case, Elevator Mfr's. Assn. v. Elevator Constructors, [U.S.D.C., S.D.N.Y. 78 LRRM 2215 (1971)] it was held that Boys Markets, supra, mandated jurisdictional limits in the following way:

> "As I read the instructions in Boys Markets, supra, they are jurisdictional and delimit what may be excepted from the restrictions of the Norris-LaGuardia Act. In the Boys Markets case the employer actually 'sought to invoke the grievance and arbitration procedures specified in the contract.' (398 U.S. at 239, 74 LLRM 2258).

> The employer must seek arbitration before he may seek injunctive relief.
>
> Accordingly, as a preliminary to considering injunctive relief, the employer is ordered to seek arbitration as a condition to applying for injunctive relief. If the Union refuses to arbitrate plaintiff may come back with an application for injunctive relief."

The court, in the instant case, in colloquy with counsel, indicated that a claim of "irreparable damage" obviated the necessity of complying with administrative remedies. (C.R., Reporter's Transcript, 26:10-32:26). There simply is no authority for this position.

Article XII, Section E of the Master Labor Agreement (incorporated in plaintiff's complaint, and identified as Exhibit A therein) sets forth a procedure for settling disputes by arbitration, and specifically provides:

> "Neither party to this agreement shall file any action because of a claimed breach of this Agreement without giving notice, in writing, to the other party and allowing ten (10) days thereafter to such party for redress or correction, without first exhausting the grievance and arbitration procedure of this Agreement."

There was no pleading or proof of any attempt to comply with the conditions precedent, namely, ten (10) days' written notice and exhaustion of the grievance and arbitration procedures of that Agreement.

Arbitration is in the nature of a substitute for a legal action. Until a plaintiff has himself indicated a bona fide attempt to utilize arbitration with subsequent frustration of such attempt, because of improper conduct by defendants, he has not fulfilled the condition precedent of the Contract.

California Code of Civil Procedure Section 457 states that it is necessary to plead performance of conditions precedent in the Agreement even though they may be pleaded in a general way.

An arbitration clause must be complied with where it is a condition precedent to the bringing of a legal action:

> "When it is provided in the collective bargaining contract the dispute must be referred to an arbitrator, either party has an option to arbitrate if he so desires, but, should he decide to litigate, he must first submit to arbitration and exhaust that remedy." Williams v. Pacific Electric Ry. Co., 147 Cal. App. 2d 1 (1956).

California Code of Civil Procedure, Title IX, Section 1280, et seq. provides a remedy to compel arbitration by way of a petition for an order to compel arbitration, but nowhere provides for injunctive relief pending an order compelling arbitration. Code of Civil Procedure Section 1281.4 provides further that the court, in which such an action is pending shall, upon motion of a party to such action, stay the action until arbitration is had or until such earlier time as the court specifies.

V

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN FINDING DEFENDANTS GUILTY OF CONTEMPT IN THAT NO DECLARATIONS OR AFFIDAVITS OR ANY OTHER COMPETENT EVIDENCE WAS OFFERED OR RECEIVED IN EVIDENCE.

Due process of law guaranteed by the 14th Amendment is denied when a State convicts of crime one against whom it has introduced no evidence. Thompson v. Louisville, 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 (1960).

The record in the instant case clearly establishes that none of the declarations or affidavits filed herein was ever offered or received in evidence and no testimony was taken from any person. (C.R. Reporter's Transcript, Case Number 323265 and 323217).

There being absolutely no competent evidence of contempt before the court, the convictions for contempt must be set aside.

VI

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT THE FINDINGS OF CONTEMPT WERE MADE BASED UPON CONDUCT THAT WAS NOT CLEARLY A VIOLATION OF THE ORDER.

An order issued in the area of First Amendment rights must be couched in the narrowest terms possible. United Farm Workers Organizing Committee v. Superior Court (1971) Cal. Supreme Court S. F. 22791, April 15, 1971.

The temporary restraining orders in the case at bar broadly state:

> ". . . pending the hearing and determination of the above order to show cause, defendant INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, and all others acting on their behalf, are hereby restrained and enjoined from doing or attempting to do or causing to be done, directly or indirectly, by any means, method or device whatsoever any or all of the following things:
>
> Causing, instigating, furthering, carrying on, or otherwise aiding a strike of CAMERON BROTHERS CONSTRUCTION CO., INC. [DALEY CORPORATION] pending final resolution of plaintiffs' grievance as to whether such activity violates the collective bargaining agreement between the plaintiffs and defendant INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12."

The strike conducted by defendants was against Southern California Testing Laboratory, Inc., not Cameron or Daley, and all picket placards and notices clearly identified that the object of the strike was not against Cameron or Daley. By the court's finding that picketing of Southern California Testing Laboratory, Inc. caused a work stoppage of the Cameron and Daley, it necessarily follows that primary employers can only be picketed in common jobsite situations where the picketing is ineffective! This is a preposterous conclusion, and clearly violative of federal law. Sailor's Union

of the Pacific, 92 N.L.R.B. 547, commonly referred to as the Moore Dry Dock Case.

Defendants scrupulously observed compliance with the restraining orders of the court in that picketing of the job sites was limited to times when the employer with whom they have a valid primary labor dispute, Southern California Testing Laboratory, Inc., could reasonably be expected to have been engaged in its normal business activity on the sites. The picketing took place reasonably close to the situs of that business activity; and the pickets took every precaution to clearly disclose that the labor dispute was only with Southern California Testing Laboratory, and even distributed handbills disclaiming any dispute with the real parties in interest.

It is submitted that the activities on the part of the Union not only comport with the respondent's restraining order, but also complies with the standards set by the National Labor Relations Board in the Moore Dry Dock case, supra. In that case, although the premises picketed were those of a secondary employer, the situs of the primary employer was "ambulatory", necessitating a balance between the Union's right to picket and the interest of the secondary employer in being free from picketing. The Board announced four standards for picketing in such situations which would be presumptive of valid primary activity:

1. That the picketing be limited to times when the situs of dispute was located on the secondary premises;

2. That the primary employer be engaged in his normal business;

3. That the picketing take place reasonably close to the situs; and

4. That the picketing clearly disclose that the dispute is only with the primary employer.

The foregoing standards were approved by the court in Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B., 366 U.S. 667 (1961), which also affirmed the technique of using separate gates in "common situs" cases.

In the case at bar, picketing was, in fact, done only at the gates or places designated by the owner-developer, and only when the primary employer or his designated agent or agents could reasonably be expected to be on the jobsite. Local 861, International Brotherhood of Electrical Workers and Plauche Electric, Inc., 135 N.L.R.B. 250 (1962).

The overly broad reading which the court afforded the language in question is not warranted by the cases. The cases require that "the language . . . imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby," (Plummer v. Superior Court, 20 Cal. 2d 158, 164 (1942)), and liability for violating an order " 'should not rest upon implication or conjecture' but rather upon an order expressing in 'clear, specific and unequivocal' language the act required." Foust v. Foust, 47 Cal. 2d 121, 124 (1956).

Since a fair reading of the Order would not give notice that the order prohibited picketing Southern California Testing Laboratory at common jobsites, it was a denial of due process to hold the petitioners in contempt for such conduct and such judgments should be annulled.

Compare Oil Workers, supra, 103 Cal. App. 2d at 539-41, 548.

VII

RESPONDENT ACTED IN EXCESS OF ITS JURISDICTION IN THAT THERE WAS NO BASIS FOR FINDING THE UNION LIABLE FOR THE CONDUCT OF EMPLOYEES OF THE REAL PARTIES IN INTEREST.

Respondent found that "protestations were made by the representatives of the Union, both orally and in writing" to employees of both Daley and Cameron, but that the employees still refused to work (C.R. Reporter's Transcript, 67:17-68:8), and that the employees "stopped work and left the jobsite on all occasions when defendant caused picketing, ostensibly of Southern California Testing Laboratories."

Nowhere did the court find that any of petitioners used any code or signals to induce the employees of Daley or Cameron to stop work. Clearly, respondents could not have been more explicit in propagandizing that their labor dispute was solely directed at Southern California Testing Laboratory, and the court indicated that picketing Southern California Testing Laboratory was not intended to have been prohibited by the restraining order (C.R., Reporter's Transcript, 71:13-15).

Clearly, the employees of the real parties in interest decided by themselves to respect the picket line and refused to work behind it.

No proof was offered as to the identity of such employees beyond the fact that they were employees of the

real parties in interest, nor was any proof offered of Union involvement in, or control of, such persons at the time the alleged violations occurred.

Oil Workers International Union v. Superior Court, 103 Cal. App. 2d 512 (1951) is the leading case in this area, and in that case there is set forth the standards by which a court can determine union responsibility in contempt proceedings for the acts of its members. The court there said:

> "The principal question, in each case, is whether or not the Local Union bore such a relation to the transaction that it was a participant, directly or through its member actors, and legally responsible for the acts done, as acts enjoined by the restraining order. That is the scope and extent of the inquiry. . . . " Oil Workers, 103 Cal. Cal. App. 2d at 552-53.

United States v. United Mine Workers, 77 F. Supp. 563 (D. D. C. 1948), cited by respondent in finding Union responsibility herein, involved 250,000 to 350,000 individuals and the argument presented there was that this vast number of men would all get the same idea at once, independently of leadership, and walk out of the mines. A great deal of evidence was adduced at the hearing about the demands the union made on the employer and the employers' refusal to meet those demands. It was shown that the union was anxious to obtain something from the employers and that the union refused to work for those employers until the employers capitulated.

Clearly, the case at bar differs in that it is undisputed that some employees of the defendant Union have

respected the Union's picket lines and some have not. Moreover, the real parties in interest in the instant case are third-party neutrals with whom the Union has no dispute.

Indeed, if the Union were to strike third-party neutrals (such as the real parties in interest) the National Labor Relations Board holds such activity to constitute a secondary boycott in violation of Section 8(b) (4) of the Taft-Hartly Act, requiring the Regional Director to seek preliminary injunctive relief in Federal Court under Section 10(1) of the Taft Act.

Respondent's decision in effect makes the Union the guarantor of the conduct of the real parties in interest's workers, and responsible for policing their activities. In light of the absence of proof of control of these employees by the Union, such imposition of liability is without basis in law. Merely because an injunction has been obtained against the Union does not mean the Union either can, or is obliged for the real parties in interest's benefit to enforce the terms of that order.

Indeed, the evidence that the persons who allegedly violated the order were employees of the real parties in interest, coupled with the right to visit economic sanctions upon these workers by discharging them for misconduct, makes it clear that it was the real parties in interest, not the Union, which exercised effective control over the employees. Thus, there was no substantial evidence to support a finding that the Union was guilty of contempt for conduct not shown to be done by persons subject to its control.

There was no substantial evidence presented of any kind of relationship between the Union and the employees

such as would warrant a judgment of contempt against the Union for the employees' conduct. Moreover, it was not disputed that some employees and members of the Union had respected the Union's picket lines and some did not.

CONCLUSION

For the foregoing reasons, petitioners pray that this writ be granted.

Respectfully submitted,

BRUNDAGE, WILLIAMS & ZELLMANN

By: JERRY J. WILLIAMS

Of Counsel:

Donald E. Studer
3746 Fifth Avenue
San Diego, California 92103

APPENDIX

Procopio, Cory, Hargreaves and Savitch
Attorneys at Law
1900 First National Bank Building
San Diego, California 92101
Telephone: 234-4601

Filed
R. B. James, Clerk
Mar 4 1971
By_____
Deputy

Gray, Cary, Ames & Frye
2100 Union Bank Building
San Diego, California 92101
Telephone: 233-7323

Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., a California non-profit corporation, for and on behalf of its members, and the DALEY CORPORATION, a California corporation, Plaintiffs, v. THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, and DOES 1 through 100, inclusive and ROES 1 through 100, inclusive, Defendents.	NO. 323265 JUDGMENT AND ORDER RE CONTEMPT OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12 AND STERLING DENNIS

The contempt proceedings against the International Union of Operating Engineers, Local Union No. 12 and Sterling Dennis, came on for hearing before the undersigned on February 17, 19 and 22, and March 1, 1971, upon the declaration of Donald L. Jellison and order to show cause directed to defendant International Union of Operating Engineers, Local No. 12 (hereinafter "Union") and Sterling Dennis, an agent of said defendant, and plaintiffs appearing by their attorneys, Procopio, Cory, Hargreaves and Savitch by Paul B. Wells and Gray, Cary, Ames & Frye by James K. Smith and David Geerdes, and defendant Union and Sterling Dennis appearing by their counsel, Brundage, Williams & Zellman by Jerry J. Williams and Donald Studer, and evidence having been presented by declarations submitted by plaintiffs, defendant Union and Sterling Dennis, and said evidence having been considered and the matter having been argued and submitted and good cause appearing therefor, and it appearing that at all times defendant Union and its agent, Sterling Dennis, had and they now have the present ability to comply with the temporary restraining order of this court made herein on the 28th day of January, 1971.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Union was in contempt of this court in its willful failure to obey the temporary restraining order of this court made on January 28, 1971, on five separate occasions, to-wit: January 29, 1971, February 1, 1971, February 4, 1971, February 5, 1971 and February 8, 1971, and that Sterling Dennis is and at all relevant times was an agent of the defendant Union and that he was in contempt of this court on January 29, 1971 by reason of his willful failure to obey the temporary restraining order of this court made on January 28, 1971.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Union shall be and hereby is fined in the amount of FIVE HUNDRED DOLLARD ($500.00) for each instance of its contempt of the aforesaid temporary restraining order, a total of TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500.00) and for his single instance of contempt, the payment of said fines by both the defendant Union and Sterling Dennis to be stayed for a period of seventy-two (72) hours after the reporter's transcript of the proceedings herein is prepared and, should defendant Union and Sterling Dennis during said seventy-two (72) hour period institute proceedings in the Fourth District Court of Appeal for a review of this Order, for such further period of time required for receipt of the decision of said District Court of Appeal.

DATED: March 4, 1971

FRANKLIN B. ORFIELD
Judge, Superior Court

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, AND STERLING DENNIS, Petitioners,	)	4 Civil No. 11033
vs.	)	(Superior Court No. 323265)
SUPERIOR COURT ETC., COUNTY OF SAN DIEGO, Respondent,	)	
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ETC., ET AL, Real Parties in Interest.		

BY THE COURT:

The Petition for Writ of Certiorari is denied.

C O P Y

DATED July 7, 1971.

COUGLIN, Acting, PJ.

cc: Brundage, Williams & Zellman - SD
Procopio, Cory, Hargreaves & Savitch - SD
Gray, Cary, Ames & Frye - SD
Superior Court - SD

44707-114 9-70 6M OSP

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 4 — 1971

Dear Sir: I have this day filed Order

HEARING DENIED

In re: 4 Civ. No. 11033

Internat. Union of Operating Engineers, Local 12

vs.

Superior Court, County of San Diego

Respectfully,

G. E. BISHEL
Clerk

50153-877 1-71 3M OSP

Procopio, Cory, Hargreaves and Savitch
Attorneys at Law
1900 First National Bank Building
San Diego, California 92101
Telephone: 234-4601

Gray, Cary, Ames & Frye
2100 Union Bank Building
San Diego, California 92101
Telephone: 233-7323

Attorneys for Plaintiffs

Filed
R. B. James, Clerk
Mar 4 1971
By _____
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

ASSOCIATED GENERAL CONTRACTORS OF AMERICA, SAN DIEGO CHAPTER, INC., a California non-profit corporation for and on behalf of its members, and CAMERON BROTHERS CONSTRUCTION COMPANY, INC., a California corporation, Plaintiffs, v. THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, and DOES 1 through 100, inclusive and ROES 1 through 100, inclusive, Defendants.	NO. 323317 JUDGMENT AND ORDER RE CONTEMPT OF INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12 AND ERNEST HEINRICH

The contempt proceedings against the International Union of Operating Engineers, Local Union No. 12 and Ernest Heinrich, came on for hearing before the undersigned on February 17, 19 and 22, and March 1, 1971, upon the declarations of John Cameron and Barry J. Smith and Order to Show Cause directed to defendant International Union of Operating Engineers, Local No. 12 (hereinafter "Union") and Ernest Heinrich, an agent of said defendant, and plaintiffs appearing by their attorneys, Procopio, Cory, Hargreaves and Savitch by Paul B. Wells and Gray, Cary, Ames & Frye by James K. Smith and David Geerdes, and defendant Union and Ernest Heinrich appearing by their counsel, Brundage, Williams & Zellman by Jerry J. Williams and Donald Studer, and evidence having been presented by declarations submitted by plaintiffs, defendant Union and Ernest Heinrich, and said evidence having been considered and the matter having been argued and submitted and good cause appearing therefor, and it appearing that at all times defendant Union and its agent, Ernest Heinrich, had and they now have the present ability to comply with the Temporary Restraining Order of this court made herein on the 1st day of February, 1971.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Union was in contempt of this court in its willful failure to obey the Temporary Restraining Order of this court made on February 1, 1971, on two separate occasions, to-wit: February 1, 1971 and February 4, 1971, and that Ernest Heinrich is and at all relevant times was an agent of the defendant Union and that he was in contempt of this court on February 3, 1971 by reason of his willful failure to obey the Temporary Restraining Order of this court made on February 1, 1971.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Union shall be and hereby is fined in the amount of FIVE HUNDRED DOLLARS ($500.00) for each instance of its contempt of the aforesaid Temporary Restraining Order, a total of ONE THOUSANT DOLLARS ($1,000.00) and that Ernest Heinrich is hereby fined an amount of FIVE HUNDRED DOLLARS ($500.00) for his single instance of contempt, the payment of said fines by both the defendant Union and Ernest Heinrich to be stayed for a period of seventy-two (72) hours after the reporter's transcript of the proceedings herein is prepared and, should defendant Union and Ernest Heinrich during said seventy-two (72) hour period institute proceedings in the Fourth District Court of Appeal for a review of this Order, for such further period of time required for receipt of the decision of said District Court of Appeal.

DATED: March 4, 1971

FRANKLIN B. ORFIELD
Judge, Superior Court

COURT OF APPEAL — STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, AND ERNEST HEINRICH, Petitioners	4 Civil No. 11034
vs.	(Superior Court No. 323317)
SUPERIOR COURT ETC., COUNTY OF SAN DIEGO Respondent,	
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ETC., ET AL, Real Parties in Interest.	

BY THE COURT:

The Petition for Writ of Certiorari is denied.

C O P Y

DATED July 7, 1971

COUGHLIN, Acting P. J.

cc: Brundage, Williams & Zellman - SD
Procopio, Cory, Hargreaves & Savitch - SD
Gray, Cary, Ames & Frye - SD
Superior Court - SD

CLERK'S OFFICE SUPREME COURT

1250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 4 — 1971

Dear Sir: I have this day filed Order_____

In re: 4 Civ. No. 11034

Internat. Union of Operating Engineers, Local 12

vs.

Superior Court, County of San Diego

Respectfully,

G. E. BISHEL
Clerk

50153-877 1-71 OSP

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 1971, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Procopio, Cory, Hargreaves and Savitch, 1900 First National Bank Building, San Diego, California 92101 and to Gray, Cary, Ames and Frye, 2100 Union Bank Building, San Diego, California 92101, counsel for the Real Parties in Interest and three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Clerk of the Superior Court of the State of California, for the County of San Diego, Respondent.

I further certify that all parties required to be served have been served.

Donald E. Studer

BRUNDAGE, WILLIAMS & ZELLMANN
3746 Fifth Avenue
San Diego, California 92103